Supreme Court, U.S.
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No. : _____

In the

Supreme Court of the United States

October Term, 2001

ANTONINO AIELLO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Supreme Court's decision in *Richardson v. United States,* 119S.Ct.1703 (1999) is based on a new rule of constitutional law and should be made retroactive to cases on collateral review.

Whether the restrictions in the AEDPA on the filing of successive habeas petitions have an impermissible retroactive effect is violation of petitioner's due process rights.

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption. The Appellee is the United States of America.

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Appendix A—The Order of the Court of Appeals denying leave to file a second or successive motion under 28 U.S.C. §2255 ¶8 was filed on January 25, 2002 ..... 1a

The petitioner, Antonino Aiello petitions for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Second Circuit denying him permission to file a second or successive motion under 28 U.S.C. §2255.

CITATION TO OPIONION BELOW

The Order of the Court of Appeals denying leave to file a second or successive motion under 28 U.S.C. §2255 ¶8 appears in the appendix hereto.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals denying leave to file a second or successive motion under 28 U.S.C. §2255 ¶8 was filed on February 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1251(1).

STATEMENT OF THE CASE

Petitioner was convicted in the Southern District of New York on February 12, 1988, after a jury trial, of conspiring to distribute and possess with intent to distribute heroin and cocaine, in violation of 21 U.S.C. §846 (Count 1); distributing and possessing with intent to distribute heroin and cocaine, in violation of 21 U.S. C. §§812, 841(a)(1) & (b)(1)(A) and 18 U.S.C. §2 (Counts 2-9, 12); and operating a continuing criminal enterprise ("CEE") for the distribution of narcotics, in violation of 21 U.S.C. §848 (Count 15). Aiello was sentenced on March 18, 1988, to fifteen years' imprisonment, a $25,000.00 fine and lifetime special parole terms on Counts 2-9; twenty years' imprisonment, a $250,000.00 fine and a lifetime special parole term on Count 12; and life imprisonment without parole and a $100,000.00 fine on Count 15. The sentence were all ordered to run consecutively. *See United States v.*

Aiello, 864 F.2d 257, 259, 262 (2d Cir. 1988).

Petitioner appealed from all counts except Counts 1 and 6 of his judgment of conviction. He challenged the sufficiency of the evidence as to the distribution and possession counts and the CCE count. On December 23, 1998, the Court of Appeals rejected his contention and held that an aiding and abetting offense may serve as a predicate for the continuing criminal enterprise statute, so long as the aider and abettor is a "kingpin." *United States v. Aiello,* 864 F.2d at 259. Petitioner also challenged the district court's instruction that, for purposes of the "continuing series" element of the CCE statute, the jury could consider any violation of the narcotics laws, even a violation not charged in the indictment. This remaining contention also was rejected and the judgment of the district court was affirmed. *Id.*

After the Court of Appeals affirmed petitioner's conviction on direct appeal, he filed a §2255 motion with the district court seeking relief based upon this trial counsel's conflict of interest and ineffective assistance. The order of the district court denying Aiello's motion to set aside his conviction was affirmed. *United States v. Aiello,* 900 F.2d 528, 530 (2d Cir. 1990).

A second §2255 motion was filed by petitioner in 1995 whereby he asserted two grounds for relief: (1) that he was denied effective assistance of counsel under the Sixth Amendment and that he was at least entitled to an evidentiary hearing at which he may seek to prove his entitlement to relief under this claim; and (2) that his conviction violated the Double Jeopardy Clause due to his prior civil forfeiture proceeding. The motion was denied on October 9, 1997. *Aiello v. United States,* No. 95 CIV 4461 (hb), 1997 WL 630184, *a (S.D.N.Y., Oct. 9, 1997). The

court's opinion and order was amended on November 12, 1997, to address and reject petitioner's Rule 60(b)(6) argument that the judgment in his first §2255 petition should have been vacated on the ground that the judge should have recused himself. *Aiello v. United States,* 1997 WL 716913 (S.D.N.Y., Nov. 12, 1997).

Petitioner appealed the denial of his two motions (i. e., the §2255 motion to vacate his 1988 conviction due to ineffective assistance of counsel and his Rule 60(b) motion to vacate the denial in 1989 of his earlier §2255 motion). The Court of Appeals found Aiello's arguments to be without merit and affirmed the district court's actions. *Aiello v. United States,* 159 F.3d 1345 (Table), 1998 WL 398800 (2d Cir., June 8, 1998). A petition for writ of certiorari to the United States Supreme Court was denied on October 13, 1998. *Aiello v. United States,* 525 U.S. 932 (1998).

In January 2000, petition sought leave from this Court to file a successive §2255 motion arguing that, under *Richardson v. United States,* 526 U.S. 813 (1999), his §848 conviction for operating a CCE for the distribution of narcotics violated the Due Process Clause of the Fifth Amendment to the United States Constitution. The Court of Appeals determined that the ground for Aiello's motion was "not based on either newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court." The order further stated that, with respect to Aiello's *Richardson* claim, the denial of his motion was "without prejudice to [his] filing a petition in the district court pursuant to 28 U.S.C. §2241 if he can meet the criteria for a such a petition." *Id.* (citing *Triesman v. United States,* 124 F.3d 361 (2d Cir. 1997).

On February 16, 2001, petitioner filed a petition

under 28 U.S.C. §2241 in the Middle District of Pennsylvania. He claimed that under *Richardson*, he may be "actually innocent of the §848 offense." Specifically, petitioner argued that his conviction on the CCE count – for which he is serving a life sentence – was unconstitutionally obtained because the jury was not instructed that it had to agree unanimously as to each of the violations which constituted the "series of violations" under 21 U.S.C. §848.

In dismissing his petition, that district court held his claim must be made "by way of a §2255 motion in the district of the criminal trial court", but noted the Second Circuit's holding in *Santana-Madera* that *Richardson* was retroactive, and suggested filing a new petition:

> This court agrees with the analysis andConclusion set forth by Magistrate Judge Mannion in his report, however, it is important to note that the Second Circuit Court of Appeals recently determined that the Supreme Court's decision in *Richardson* is a new rule of substantive law that is to be applied retroactively. *See Santana-Madera v. United States,* 260 F.3d 133, 138-39 (2d Cir. Aug. 3, 2001). This may grant petitioner with an opportunity to present a successive § 2255 motion to the Second Circuit Court of Appeals.
>
> The proper vehicle to challenge a conviction or sentence is not a §2241 petition but rather a §2255 motion. Although Aiello is precluded from directly filing a §2255 motion because he has filed two prior motions under that section, he can petition the Second Circuit Court of Appeals to

> certify a successive motion. Section 2255 unambiguously provides prisoners the opportunity to present a successive petition to the appropriate court of appeals in an effort to have such petition certified as containing "a new rule" of constitutional law, made retroactive on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. §2255. The Second Circuit of Appeals' recent decision in *Santana-Madera* that *Richardson* is to be applied retroactively on collateral review may create a means through which petitioner could re-assert a successive §2255 motion notwithstanding that it must be certified by the appellate court.

On January 29, 2002, petition sought leave to file a successive motion to vacate his sentence pursuant to Title 28, United States Code, Section 2255. On February 25, 2002, the Court of Appeals for the Second Circuit denied leave to appeal.

REASONS FOR GRANTING THE WRIT

The decision below raises a significant federal question concerning whether this Court's decision in *Richardson v. United States,* 119S.Ct. 1703 (1999) is based on a new rule of constitutional law and should be made retroactive to cases on collateral review.

In *Richardson v. United States,* 526 U.S. 81 (1999), the Court held that a jury in a federal criminal case brought under the CCE statute, 21 U.S.C. §848, must unanimously agree not only that the defendant committed some "continuing series of violations" but also that the defendant

committed each of the individual "violations" necessary to make up that "continuing series." 119S.Ct. at 1713. In *Santana-Madera v. United States,* 260 F. 3d 133 (2d Cir. 2001), the Second Circuit Court of Appeals concluded that the rule in *Richardson* has retroactive application subject to a harmless error review. The *Richardson* rule expresses a new constitutional rule because the jury's failure to unanimously agree on each of the offenses forming the continuing series of violations violated his Sixth Amendment right to have a jury decide each element of the offense beyond a reasonable doubt.

The holding in *Richardson* is a new rule of constitutional law not previously available to petitioner, but has not been made retroactive to cases on collateral review by the Supreme Court. A successive motion is authorized under 28 U.S.C. §2255 only if the Supreme Court has "either expressly declare(d) the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding." *In re Smith*, 142 F.3d 832, 835 (5th Cir. 1998)(quoting *Rodriguez v. Superintendent, Bay Street Correctional Ctr.*, 139 F.3d 270, 275 (1st Cri. 1998) (citing *In re Vial,* 115 F.3d 1192, 1197 (4th Cir. 1997); *In re Hill*, 113 F.3d 181, 1184 (11th cir. 1997)). The Supreme Court has neither declared that holding in *Richardson* is applicable retroactively on collateral review, nor applied the holding in a collateral proceeding.

1. The Restrictions In The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") On The Filing Of Successive Petition Do Have An Impermissible Retroactive Effect Violative Of Aiello's Due Process Rights.

Finally, petition asserts that the restrictions in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") on the filing of successive habeas petition have an impermissible retroactive effect in violation of petitioner due process rights.

Specifically, petitioner argues that the AEDPA's prospective effect limiting his ability to file a successive habeas petition. In short, petitioner asserts that his due process rights have been violated because prior to the enactment of the AEDPA he may have been able to file a successive petition based upon the holding in *Richardson*, but post-AEDPA, he cannot; acceptance of this argument would render the AEDPA's restrictions on successive habeas petitions a nullity.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A – The Order of the Court of Appeals denying leave to file a second or successive motion under 28 U.S.C. §2255 ¶8 was filed on February 25, 2002.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of February two thousand and two,

Present:

Hon. Amalya L. Kearse,
Hon. Dennis Jacobs,
Circuit Judges,
Hon. Barbara S. Jones, *
District Judge.

Antonino Aiello,

Petitioner-Appellant,

v.

02-3517

United States of America,

Respondent-Appellee.

Petitioner has applied for leave to file a second or successive motion under 28 U.S.C. §2255 ¶8. Upon due consideration, it is ORDERED that the application to file a second or successive motion is DENIED. Petitioner's proposed claim does not meet the requirements of 28 U.S. C. §2255 ¶8 for the filing of a second or successive §2255 motion.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: s/ Lucille Carr

* The Honorable Barbara S. Jones, of the United States District Court for the Southern District of New York, sitting by designation.

FEB 25 2000